2012 WL 8680988 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

In re: Estate of Harriet Dorothy MEYERS, a/k/a Harriet D. Meyers.
Judith GAEDE, Appellant,
v.
John D. SATTLER, Respondent.

No. A12-2123.
2012.

Appellant's Brief and Appendix

Teresa K. Patton, The Patton Law Office, P.A., 970 Raymond Ave., Suite 60, St. Paul, MN 55114, (651) 260-2572, Attorney Reg. No. 205679.

John D. Hagen, Jr., Attorney at Law, P.O. Box 15609, Minneapolis, MN 55415, (612) 623-0908, Attorney Reg. No. 0039330, Attorneys for Appellant.

John C. Lillie, III, Dudley and Smith, P.A., 101 East Fifth St., Suite 2602, St. Paul, MN 55101, (651) 291-1717, Attorney for Respondent.

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***1 STATEMENT OF ISSUES**

I. DID THE DISTRICT COURT ERR IN NOT GRANTING A CONTINUANCE FOR FURTHER DISCOVERY BEFORE GRANTING SUMMARY JUDGMENT?

Appellant requested a continuance for further discovery in her attorney Teresa Patton's letter to the court on July 27, 2012. This request was repeated by attorney Kathy Tatone in her letter to the court on August 20, 2012.

The district court did not order a continuance, leaving the decision to the referee. At the ex parte hearing on August 21, 2012, the referee inquired about the discovery that Appellant had requested, and was led by Respondent's counsel to believe that such discovery would be futile. (Tr. of Aug. 21, 2012, pp. 9-15) The referee then proceeded with the hearing and entered summary judgment, effectively denying the continuance.

Most Apposite Cases:

Bixler v. J.C. Penney Co., 376 N.W.2d 209 (Minn. 1985);

Rice v. Perl, 320 N.W.2d 407 (Minn. 1982).

II. DID THE DISTRICT COURT ERR IN GRANTING SUMMARY JUDGMENT DISMISSING THE CLAIM OF UNDUE INFLUENCE?

At the ex parte summary judgment hearing, the referee sua sponte raised the issue whether undue influence might be shown by financial records and by evidence of some third party's involvement in the decedent's financial affairs. (Tr. of Aug. 21, 2012, pp. 12-13) Respondent's counsel assured the referee that "all the depositions, none of it focused on any of that stuff." (Id., p. 13) In fact, Respondent's exhibits included a ***2** deposition transcript clearly raising the evidentiary issues about which the referee had inquired. (Ex. 10, pp. 6-7, 46-66)

The referee recommended, and the district court granted, summary judgment dismissing all Appellant's claims, by the order of August 22, 2012. The order included no analysis of undue influence or of any other claim. Appellant attempted to show a genuine issue as to undue influence by her Memorandum filed on September 7,2012 and by her arguments at the hearing on September 11, 2012. (Tr. of Sept. 11, 2012, pp. 18-37)

Most Apposite Cases:

In re Estate of Opsahl, 448 N.W.2d 96 (Minn. App. 1989);

In re Estate of Olson, 227 Minn. 289, 35 N.W.2d 439 (1948).

III. DID THE DISTRICT COURT ERR IN NOT VACATING SUMMARY JUDGMENT ON GROUNDS OF EXCUSABLE NEGLECT?

Appellant sought relief from summary judgment by the memorandum and exhibits which she filed on September 7, 2012. She again sought relief in her attorney's letter to the court on September 10, 2012. That letter cited Minn. R. Civ. P. 60.02 and the "*Finden* factors" used to assess excusable neglect.

The district court declined to grant relief. At the hearing on September 11, 2012, it excluded arguments on summary judgment. (Tr. of Sept. 11, 2012, p. 18) It reaffirmed the summary judgment by its orders of September 24, 2012 and of October 11, 2012.

Most Apposite Cases:

Betts v. M. I. L. Realty Corp., 269 N.W.2d 42 (1978);

***3** *Charson v. Temple Israel,* 419 N.W.2d 488 (Minn. 1988).

IV. DID THE DISTRICT COURT ERR IN AWARDING SANCTIONS UNDER MINN. R. CIV. P. 11?

Respondent moved for Rule 11 sanctions by its motion filed on August 15, 2012. Appellant opposed this motion by her Memorandum filed on September 7, 2012 and by her counsel's arguments at the hearing on September 11, 2012. (Tr. of Sept. 11, 2012, pp. 18-37)

The district court granted Rule 11 sanctions by its order of September 24, 2012. It specified the sanctions in its Order Granting Attorney Fees on October 24, 2012.

Most Apposite Cases:

In re Estate of Smith, 444 N.W.2d 566 (Minn. App. 1989);

Peterson v. 2004 Ford Crown Victoria, 792 N.W.2d 454 (Minn. App. 2010).

STATEMENT OF THE CASE

This appeal is taken from judgments and orders terminating a will contest prior to trial. Dispositive issues were resolved through an ex parte hearing conducted while Appellant's counsel was in Nepal.

The decedent left two wills. Her daughter, the Appellant, applied for informal probate of the earlier will in the Probate Division of the District Court for the Second Judicial District (Ramsey County). She was informally appointed Personal Representative in October 2010.

***4** Shortly afterward, Respondent (a grandchild) petitioned for formal probate of the later will. Appellant filed an objection, alleging, inter alia, undue influence, lack of testamentary capacity, and fraud. (App-1)

Trial was scheduled for September 2012, but there was no scheduling order setting discovery deadlines or motion deadlines. Respondent's counsel set a summary judgment motion for hearing in August. (App-6) Appellant's counsel objected on grounds that documents had not been produced and that she would be out of the country on a long-scheduled service project in Nepal. (Add-20)

Appellant's counsel was told by the judge's clerk that the judge had said the hearing should be rescheduled. Relying on that statement, she went abroad. While in Nepal, she learned that the hearing had not been rescheduled, and moreover that Respondent had moved for Rule 11 sanctions.

Appellant's counsel arranged for substitute counsel to attend the hearing. The referee, however, directed the substitute counsel not to attend. At the ex parte hearing, the referee inquired about factual issues (particularly issues that might be raised by unproduced documents), and was assured that there were none.

A one-page order was issued on August 22, 2012, signed both by Referee Joel C. Olson and by Judge James H. Clark, Jr. (Add-1) The order granted summary judgment, without analysis. It stated that Appellant might bring a Motion to Reconsider to be heard in conjunction with the Rule 11 motion.

***5** Appellant's counsel returned from Nepal and filed a lengthy memorandum, with affidavits and exhibits. She submitted evidence of undue influence and evidence of an attempt to bribe a witness.

Appellant's counsel fax-filed and served these materials using an online faxing service. The filing was completed shortly after midnight on the filing date. No prejudice was shown from the brief delay.

Appellant asked the court to vacate the summary judgment, citing Rule 60.02. (Add-24) She argued that, standing alone, Respondent's own exhibits showed genuine issues of material fact with regard to undue influence. The district court disregarded these arguments, sustained the summary judgment, and granted sanctions under Rule 11.

The district court issued an Order and Memorandum (adopted verbatim from Respondent's proposed order) on Sept. 24, 2012. (Add-2) It held that Appellant and her counsel had acted in bad faith by groundlessly objecting to the will.

The court then issued an Order for Judgment on Oct. 11, 2012. (Add-13) Judgment was entered the same day. (Add-14) The order provided that there is “no just reason for dela” thus rendering the judgment final under Minn. R. Civ. P. 54.02.

On Oct. 24, 2012, the court issued two additional Orders in response to informal petitions by the Respondent. One Order awarded Respondent $17,210.53 in attorney's fees, in part against Appellant and in part against her counsel. (Add-15) The second Order terminated Appellant and appointed Respondent as personal representative, vacated the informal probate of the earlier will, and formally probated the later will. (Add-17)

***6** On Oct. 29, 2012, the district court entered an additional judgment on its Order of Sept. 24, 2012. (A-6) This judgment apparently was entered to ensure a final disposition of the case, including the orders of October 24. [1] Appellant filed a Notice of Appeal from all the foregoing judgments and orders. (App-13)

STATEMENT OF FACTS

A. General Background

The decedent, Harriet Meyers, died in 2010 at the age of 94. She was survived by her daughter, Appellant Judith Gaede, and by six grandchildren. Two of the grandchildren (Jeffrey and Michael Taylor) are Judith's sons, and live with her in Arizona. (Ex. 13, pp. 12-13) [2]

The other four grandchildren (John Sattler, Susan Sattler, Sandra Sattler, and Kathleen Sattler Andrede) are children of Judith's late brother Herbert. They all live in the Twin Cities area, as does their mother, Sharon Sattler. (See Ex. 11; Ex. 18, p. 2)

For decades, Harriet Meyers lived in Minnesota with her sister, and visited Judith in Arizona for a month or two in the winter. (Ex. 13, pp. 21-22) In the mid-2000s, the sisters had a disagreement, and Harriet moved out of her sister's home. (Ex. 11, pp. 20-21) Thereafter, she generally lived with Judith from September to April and spent the ***7** intervening months with her granddaughter Susan Sattler in St. Paul. (Ex. 13, pp. 34-35; Ex. 9, pp. 13-15)

In February 2008, while living in Arizona, Harriet executed a will and a revocable trust. (Exs. 6 and 7) The will left almost all of Harriet's property to the trust, of which Judith was the successor trustee. (Ex. 6, ¶¶ 4, 5) The trust instrument called for distribution of the estate to Judith and to four grandchildren - Susan, Sandra, Jeffrey and Michael. (Ex. 7, Art. V)

Judith states that Harriet made the will because her sister had passed away and "my two cousins were having a horrible time because my aunt did not have a will." (Ex. 13, p. 93) With regard to excluding two of her grandchildren, Harriet said that "I want... the kids that don't have money to get some money, and the ones that do, you know, they've got their own." (*Id.*, pp. 65-66)

B. The Stroke, the Broken Hip, and the Second Will

Some months after executing her will, in the spring of 2008, Harriet suffered a stroke. (*Id.*, p. 55) She was hospitalized for three or four weeks, and was in a rehabilitation facility for three months. (*Id.*, pp. 78-80) She came back to live with Judith in midsummer of 2008. (*Id.*, p. 80)

Harriet and her sister's heirs were joint owners of a cabin in Wisconsin. (Ex. 11, p. 27) Harriet's attachment to this cabin was the reason that she went to Minnesota every summer. (Ex. 13, p. 35) After finishing her rehabilitation, Harriet pled to go to the cabin. (*Id.*, p. 81)

***8** Judith flew with Harriet to Minnesota and left her with the Sattlers. The plan was that they would shortly fly her back to Arizona for the winter. (*Id.*, pp. 82-83)

When Harriet went to Wisconsin with the Sattlers, however, she slipped and broke her hip. (*Id.*, pp. 83-84; Ex. 11, pp. 26-27) She was hospitalized, had surgery, and suffered intractable pain. (Ex. 13, pp. 84-85) She could not travel, and therefore stayed in Minnesota for the winter of 2008-2009. (*Id.*; Ex. 10, p. 32)

In the course of that winter, Harriet made a second will. (Ex. 1) The will, which was executed on April 7, 2009, disinherited Judith and her sons. (*Id.*, ¶¶ 2-4) It named John Sattler as Harriet's personal representative, and divided her property among the four Sattler grandchildren. (*Id.*, Arts. Three and Four)

A few months after making this will, Harriet returned to Arizona, where she spent the winter of 2009-2010 with Judith. (Ex. 13, pp. 94-95) She never told Judith of the existence of the second will. (*Id.*, p. 97)

In April 2010, Harriet returned to Minnesota. (*Id.*, p. 94) Months later, she suffered a second stroke. Harriet died in Minnesota in September 2010. (*Id.*, pp. 105-07; Ex. 10, p. 74)

C. Respondent's Evidence

Respondent argues that irrefutable evidence proves the validity of the second will. He contends that this evidence not only warrants summary judgment, but also warrants Rule 11 sanctions on grounds that objections to the second will could not have been made in good faith.

***9** The Sattlers testify that in October 2008, after having suffered the broken hip, Harriet called a family meeting. (Ex. 10, pp. 10, 34) They state that Harriet was "very upset" because she had signed something in Arizona and did not know what it was. (Id.; Ex. 11, pp. 10-11)

Requests were made for the Arizona will by Harriet and by John Sattler. (Ex. 10, pp. 11, 14) When the will was produced, the Sattlers contend that "she absolutely could not believe it. She said thats nothing she wanted or agreed to." (Ex. 11, p. 11)

In January 2009, they state that there was a second family meeting. Both meetings were held at Susan Sattler's house, the place where Harriet stayed. Both included Harriet, Sharon Sattler, and Sharon's four children. (Ex. 10, pp. 34-35)

At the second meeting, the Sattlers state that Harriet "wanted a new will" and "wanted it fixed." (Ex. 10, p. 36; Ex. 11, p. 34) John Sattler called the law firm of Dudley & Smith to arrange for a new will. (Ex. 10, p. 36; Ex. 11, pp. 34-35)

John, Sharon and Susan accompanied Harriet to the law firm. (Ex. 9, p. 26; Ex. 11, pp. 35-37) They talked with Michael Burke, an attorney there, about "Babe [Harriet] and the cabin and her children and her grandchildren, whatever." (Ex. 11, p. 36) Harriet then went into another room with the attorney - and Sharon acknowledges that "she was so nervous about going in there." (*Id.*)

Mr. Burke filed an affidavit stating that Harriet told him that she trusted the Sattlers. (Ex. 15, ¶ 14) He states that she wanted her share of the cabin to go to the four Sattler grandchildren, and not to Judith's children. (*Id.*) She did, however, want to leave her mothers engagement ring to Judith. (*Id.*)

***10** Mr. Burke then drafted estate planning documents. (*Id.*, ¶ 16) John and Sharon Sattler brought Harriet to the law firm to sign these documents on April 7, 2009. (*See* Ex. 11, pp. 37-39)

Mr. Burke states that, in a private interview at this second meeting, Harriet told him that she "doesn't want Judy to have anything," including the engagement ring. (Ex. 15, ¶ 19) Mr. Burke revised the will accordingly, and Harriet signed it. (*Id.*, ¶ 18) Mr. Burke and one of the witnesses (a Dudley & Smith employee) state their opinions that Harriet knew what she was doing. (*Id.*, ¶ 19; Ex. 14, ¶ 3)

Dr. Denise Lewis, Harriet's primary care physician in Minnesota, also signed an affidavit. She states that Harriet "always appeared mentally clear and appeared to have a good memory." (Ex. 16, ¶ 6) However, Harriet "spoke about not remembering all of what happened while she was in Arizona and that she was not clear in thinking while she was in Arizona." (*Id.*, ¶ 5)

D. Judith's Evidence

Abundant evidence supports a genuine issue of material fact as to whether the Sattlers exercised undue influence on Harriet to change her will. Almost all of this evidence is in *Respondent's own exhibits* filed in support of his motion for summary judgment. Since Judith's exhibits are contested, this brief will separately marshal the pertinent evidence in Respondent's exhibits and in Judith's own exhibits.

1. Respondent's Exhibits that Tend to Show Undue Influence

a. Vulnerability

***11** Prior to her stroke in May 2008, everyone agrees that Harriet was robust and mentally acute. (Ex. 11, pp. 17, 23; Ex. 13, pp. 21, 33, 36, 52-53) Afterward, in the summer of 2008, Judith states that "she was always lost... totally lost," that she would wander in public places calling for Judy, and that she constantly cried for the cabin. (Ex. 13, p. 81)

Likewise, when Harriet returned to Arizona in 2009, she was weak, forgetful, unable to play cards, and confused about events. (*Id.*, pp. 95-96, 101-103) Among other things, Harriet thought that her stroke in 2008 had occurred in Minnesota. (*Id.*, p. 102) She acknowledged that "with the stroke and the hip she just flat out forgot." (*Id.*, p. 103)

The broken hip caused Harriet chronic pain, which ultimately had to be treated with morphine. (Ex. 10, p. 72) She was "screaming in pain, taking all these pills," and couldn't travel because of the pain. (Ex. 13, pp. 84-85) Susan Sattler acknowledges that "[s]he complained continuous ... about some pains from her hip surgery ... There was a pain up here, where her scar was, that didn't go away." (*Id.*, p. 72)

b. Dependency, Financial Control and Financial Payments

While in Minnesota, Harriet lived in a cordoned-off portion of Susan's living room. She slept on a couch or lounger, accompanied by a clothes rack, a TV and radio, and a rack for crossword puzzles. (Ex. 10, p. 40) For these accommodations, she paid Susan $600 a month in rent. (Id., p. 38)

Besides the rent, Harriet paid Susan (or paid on Susan's behalf) many thousands of dollars in miscellaneous checks. She paid veterinary bills for Susan's dogs - one for $685.93, others (apparently - the purpose of the checks isn't certain) for $565 and for ***12** $276. (Id., pp. 39, 59, 60) She paid monthly surcharges for groceries, and she paid for cable service. (Id., pp. 53-54, 63)

Harriet also paid Susan for time Susan took off work (one check was for $1,700). (Id., pp. 47, 54) She signed checks to "cash" (one of which was for $800). (*Id.*, pp. 48-49) Harriet signed many other checks to Susan and to her sister Sandy whose purposes can't be accounted for. (*Id.*, pp. 56 ($90, $65); 57 ($200); 58 ($250, $100); 59 ($165); 60 ($300, $187); 62 ($104, $340); 64 ($200); 66 ($200))

Many of the checks were written by Susan (who often inadvertently started to sign them, crossed out her own signature, and gave the checks to Harriet to sign). (*Id.*, pp. 46-47, 48, 58) Harriet's signatures were often irregular, and Susan admits that "[h]er signature isn't the same on any of these." (*Id.*, pp. 51-52)

The checks discussed above all were drawn on Harriet's account with American Bank. (Ex. 10, pp. 43 and ff.) In December 2008, Harriet transferred $15,000 from that account to a new account at Bremer Bank. (*Id.*, p. 50)

The Bremer Bank account was opened for Harriet by the Sattler daughters. (*Id.*, pp. 6-7) Kathleen handled the paperwork establishing the new account, and Susan was given authority to sign checks. *(Id.)* Judith's attorneys repeatedly have sought to obtain the Bremer Bank records from the Sattlers, without success. (*Id.*, pp. 51, 67-68)

Illegal drugs were floating about in the midst of these unaccounted-for checks. Both Susan and Sandra admit to smoking marijuana in the house where the checks were signed. (Ex. 10, p. 73; Ex. 12, pp. 44-45)

***13 c. False Rationale for Harriet's Change of Will**

John Sattler's Answers to Interrogatories give this explanation for Harriet's disinheriting Judith:

Decedent wished to remove her daughter (and daughter's children) because *decedent felt she had been taken advantage of after having suffered a stroke in Arizona and immediately executing a new will* stating that she was a resident of Arizona, which she

was not. As such, Decedent did not wish to leave anything in her will to Judy Gaede, or her daughter's children, Jeff Gaede and Mike Taylor.

(Ex. 25, Ans. to Int. 13 (emphasis added))

Sharon Sattler similarly stated in her deposition that Harriet "wasn't at her peak when - because of the stroke, when she signed [the prior will]." (Ex. 11, p. 19) Sharon also stated that "[h]er hearing was affected by the stroke, and she couldn't hear everything that was said [by the Arizona lawyer who drafted the will]." (Id., p. 32)

This rationale was false, as John Sattler later acknowledged at his deposition. (Ex. 9, pp. 35-36) The Arizona will was executed months *before* Harriet suffered the stroke.

The false rationale presents a credibility issue as to the Sattlers. It also suggests a course of undue influence. Harriet's doctor states that she could not clearly recall events in Arizona. (Ex. 14, ¶ 5) The Sattlers may have convinced Harriet that she was taken advantage of by being prevailed upon to execute a will in the aftermath of the stroke.

d. Incongruity of the Disinheritance

Ample evidence shows that Judith had a close relationship with her mother. Harriet lived with Judith when Judith was a young adult, and Harriet made lengthy visits to Judith's Arizona home for decades thereafter. (Ex. 13, pp. 16-20)

***14** Starting about 1980, Harriet lived with Judith for a month to six weeks every winter. (*Id.*, pp. 21-22) During the last years of her life, she lived with Judith from September to April. (*Id.*, pp. 24-25) She had a bedroom in Judith's home, and her belongings are still there. (Ex. 11, p. 24; Ex. 13, pp. 33-35)

Judith took Harriet on vacations to a timeshare in Baja California every April and November. (Ex. 13, pp. 36-37) Judith states that Harriet "was really like my sister ... we've always been very, very close." (*Id.*, p. 32)

Judith also gave extensive hospitality to several of the Sattlers. Susan lived with her for five or six months seeking work in Arizona, but failed a pre-employment drug test and returned to Minnesota. (Ex. 11, p. 20; Ex. 13, pp. 25-27) Sharon and her husband (Judith's late brother) vacationed with Judith for weeks on end. (Ex. 13, pp. 28-29)

Sharon visited Judith and Harriet for two weeks early in 2008, just prior to Harriet's signing of the first will. (Ex. 11, p. 21) Sharon stayed as a guest in Judith's home for those two weeks, and states that she saw no tension between mother and daughter. (*Id.*)

The Sattlers contend that Harriet disinherited Judith because she was angry about the first will. Yet, a few months after the disinheritance, Harriet returned to Arizona and spent the following winter with Judith. They had "a great winter," despite Harriet's forgetfulness, and Harriet never mentioned the new will. (Ex. 13, pp. 94, 97, 101-103)

2. Additional Evidence in Judith's Exhibits

a. Unsuccessful Efforts to Obtain Records

***15** Judith's exhibits demonstrate unsuccessful efforts by her attorneys to obtain medical, financial, and estate planning records. Judith's original counsel, John Hughes, sent a letter in January 2011 requesting Dudley & Smith's estate planning file and an interview with attorney Burke. (Ex. 42)

Judith's present counsel, Teresa Patton, later subpoenaed the estate planning records from Dudley & Smith (which also represents John Sattler and defends the present appeal). (Ex. 43) The firm refused to comply, asserting that the materials sought are "attorney work product, privileged, and not relevant to the underlying case." (Ex. 44)

Judith's original counsel also sought Harriet's financial records with Bremer Bank. The Bank declined to produce the records without a court order or subpoena. (Ex. 45) As noted above, Judith's counsel also requested these records from the Sattlers at Susan Sattler's deposition. (Ex. 10, pp. 51, 67-68)

Finally, Judith's present counsel sought to obtain a stipulation for the production of all medical, financial, estate planning, and real estate records. (Ex. 46) Respondent's counsel did not respond to this request, and later contended that the records were irrelevant. (Patton letter to Judge Clark, 7/27/12; Tr. of 8/21/12, pp. 6-7, 11-15)

b. Allegation of a Bribery Attempt

Judith filed an Affidavit of Michael Taylor, who is one of her sons and one of Harriet's grandchildren. Michael describes the loving relationship between his mother and grandmother, which he observed in Arizona. (Ex. 41, ¶¶ 1-8)

Michael states that his own relationship with his mother was briefly strained around the time of his grandmother's death. (Id., ¶¶ 9-10) He then states:

***16** 11) Somehow my cousin Jack Sattler [the Respondent] learned of the temporary estrangement between mom and me.

12) Jack Sattler and I had never been close but all of a sudden he started calling me. I didn't even know he had my telephone number.

13) Jack asked me to talk with the attorneys from the law firm he was working with. I cautiously agreed to listen to what they had to say, as a matter of courtesy to Jack because he was my cousin.

14) It soon became apparent what Jack and his attorneys wanted. They wanted me to give them false and damaging information about my mother.

15) I specifically remember Jack Sattler saying *"there's several thousand dollars on the table for you if you help us out in this way."*

(*Id.*, ¶¶ 11-15 (emphasis added))

Michael states that he then received a long e-mail from Jack's attorneys including many questions about Harriet and Judith, which suggested **abuse** or neglect. (*Id.*, ¶17) Michael stopped reading and "had nothing further to do with them." (*Id.*, ¶ 19) He concludes: "I think my grandmother's stroke made it possible for the Sattlers to take advantage of the situation because Grandma was physically and mentally vulnerable, unlike she had been before the stroke." (*Id.*, ¶ 22)

D. *The Probate Proceedings*

1. *Procedural History*

On October 15, 2010, Judith Gaede filed a probate petition with the Probate Registrar for Ramsey County District Court. The Registrar issued a statement of informal probate of the 2008 will, and issued Letters Testamentary to Judith as personal representative in an informal proceeding. (Ex. 19, ¶¶ 1-2)

***17** Shortly afterward, on October 22, John Sattler petitioned for formal probate of the 2009 will. He also petitioned for appointment as the personal representative. (*Id.*, ¶ 3)

On December 10, 2010, Judith filed an Objection to the probate of the 2009 will. She stated: "Petitioner, upon information and belief, objects to the purported Will of April 7, 2009, on the basis of lack of testamentary capacity, undue influence, fraud, duress or mistake." (Ex. 18, App-1)

A Scheduling Order was issued by the court on December 15, 2010. It set the matter for trial in March 2011, and made no mention of discovery deadlines or of motion deadlines. It stated, in pertinent part:

The parties shall file, no later than seven (7) days prior to the trial, the following:

a. The party's memorandum indicating *the facts that the party intends to prove and the legal basis for the claim.*

b. The names and addresses of all witnesses known to the parties who may be called at the trial by each party, including expert witnesses and the particular area of expertise each expert will be addressing.

c. A list of exhibits each party intends to offer in evidence at the trial.

d. A joint statement setting forth stipulated facts and stipulated evidentiary items, if any.

(App-2 to 3 (emphasis added))

The trial date was rescheduled several times. (*See, e.g.*, Ex. 20, 31, 34) Meanwhile, the court issued an order restraining the administration of the estate until the trial was held. (Ex. 17)

***18** Judith's first attorney withdrew in the spring of 2011. (*See* Ex. 17, ¶ 5) A second attorney withdrew in December 2011, while discovery was in progress. (Ex. 30-32) Judith's present counsel, Teresa Patton, filed a Notice of Appearance in February 2012. (Ex. 33)

The trial was rescheduled for June 2012, pursuant to a stipulation stating that "[n]either counsel has had an opportunity to complete discovery." (Ex. 34) Shortly afterward, the court again rescheduled the trial for September 2012. (Docket Entry, 4/30/12)

Ms. Patton took depositions of three of the Sattler grandchildren and their mother in mid-May of 2012. (Ex. 9-12) She expressly stated that two depositions (of John and Susan) would have to be continued pending production of financial records by the Sattlers. (Ex. 9, p. 5; Ex. 10, pp. 51, 67-69; 75) John Sattler's counsel took a deposition of Judith at the same time. (Ex. 13)

2. The E-Mail Exchange Between Counsel

In midsummer of 2012, there was an e-mail exchange between counsel. Both parties later placed it of record through correspondence to the court. (See Patton letter to Judge Clark, 7/27/12; Lillie letter to Judge Clark, 8/2/12)

On July 2, 2012, Ms. Patton sent an e-mail to John Sattler's counsel, John Lillie. It covered four specific topics, each of which is significant here. The e-mail states, in pertinent part:

RECORDS

***19** I am working on Judith's discovery responses right now. In the meantime, *I also prepared a stipulation to submit to the court to to [sic] obtain complete records (attached), since neither your clients nor my client have anything approaching complete files.* The stipulation is in draft form, so please feel free to add your own ideas. Also, you'll see that the order for estate planning records is generic (not specific to Dudley & Smith). I wrote it that way because I assume you will want to obtain the file of Arizona attorney Kent MacKinlay.

MOTION SCHEDULING

(1) You mentioned a summary judgment motion. While I believe this case is uniquely unsuited to summary judgment, I understand that you intend to go forward. *I request that you discuss possible dates with me in advance, as my son and I will be on a long-planned service project in Nepal for much of August.*

(2) If you are unwilling to stipulate to a request for a Court order for records, I will of course go forward with a motion in that regard. In turn, I would discuss possible hearing dates with you before calling the court.

DEPOSITION SCHEDULING

(1) *I need to schedule the remainder of Jack Sattler's deposition as soon as possible after we receive complete records.*

(2) *I also need to schedule the deposition of Michael Burke of your office, as soon as possible after I receive his file.*

It would be best to get these depositions completed in July. Please let me know your preferences with regard to both. Thank you.

COMMUNICATIONS IN GENERAL

I request that your office send all correspondence to me by email, as I am often working away from the office in this new paper-less world. (No need for U.S. Mail copies unless you prefer those in addition.) I hope this does not present a problem for your staff. Thank you very much.

- Teresa

(boldface in original; emphasis added) Attached to this e-mail was the proposed stipulation.

***20** On July 5, 2012, Mr. Lillie replied to Ms. Patton by e-mail. He mixed responses to all four topics in one complex paragraph, as follows:

I am fine with communicating by email, but I completely disagree with you regarding this being a unique case. Your client had no contact with Harriet for 4-5 months prior to her executing the 2009 Minnesota will and for 4-5 months after she executed it. That is not speculation on my part, that is your client's own sworn statement given during her depositions. When we tried to reschedule the previous trial date it would be 5-7 days between emails regarding possible new dates. You are now finally requesting to finish Jack's deposition and are now requesting Mr. Burke's as well, several months after we noticed all our depositions. It took 10 days for you to follow up from your last email and the court only had two days in August to hear motions and we couldn't do it in September due to the trial so the date is August 21, 2012 at 2 pm. *Further, I don't know why you would request any of Harriet's financial records and what relevance they would have to whether or not her 2009 will was validly executed.* Your depositions focused on all sorts of issues surrounding her death, which came over a year after she executed her 2009 will and thus have no bearing on it's [sic] validity. I will check with Mr. Burke and Mr. Sattler regarding their availability for depositions, but I would request that they be held at our offices due to comfort for the parties, with extra rooms and amenities.

(emphasis added)

3. The Summary Judgment Motion and Request for a Continuance

On July 20, 2012, attorney Lillie served a summary judgment motion, memorandum and exhibits, and a Rule 11 motion at attorney Patton's physical office. He did not serve a copy or mention the service by e-mail, however, and Ms. Patton did not learn of the summary judgment motion until July 27. (Patton letter to Judge Clark of 7/27/12; Lillie letter to Judge Clark of 8/2/12)

Ms. Patton telephoned Mr. Lillie on July 27 because he had not responded to her proposed stipulation for production of medical, financial and estate planning records. (Patton letter to Judge Clark, 7/27/12) At that time, Mr. Lillie told her of the pending ***21** summary judgment motion. *(Id.)* Ms. Patton protested that she didn't know of the motion, that she would need the disputed records to respond, and that she would be in Nepal on the scheduled hearing date of August 21. *(Id.)*

At a subsequent hearing, Mr. Lillie acknowledged the genuineness of Ms. Patton's surprise at the summary judgment motion. He said that in the telephone call on July 27, Ms. Patton had "freaked out" and said "what motion for summary judgment?" (Tr. of 8/21/12, pp. 7, 15) When Mr. Lillie said that he had served her office seven days ago, she responded, "That's a virtual office. I -- I'm rarely ever there." (*Id.*, pp. 7-8) Mr. Lillie acknowledged, "I believe that's true." (*Id.*, p. 17)

On July 27, the day of the conversation, Ms. Patton wrote to Judge Clark and requested that the hearing date be postponed. She cited, inter alia, Mr. Lillie's knowledge of her service trip to Nepal, his agreement to e-mail communication, and her need for the contested records in order to answer the summary judgment motion. (Patton letter to Judge Clark, 7/27/12 (Add-20))

On July 30, Ms. Patton received a call from Judge Clark's clerk Peggy, stating that the judge had instructed her that the hearing needed to be continued. Relying on this statement, Ms. Patton went to Nepal as scheduled on August 2. (Patton letter to Judge Clark, 9/10/12 (Add-24); Tr. of 9/11/12, pp. 33-35)

4. The Ex Parte Hearing

In Nepal, on August 16, Ms. Patton learned by e-mail from opposing counsel that the hearing had not been postponed. She e-mailed attorney Kathy Tatone and sought her assistance as substitute counsel. She e-mailed Ms. Tatone a synopsis of facts and ***22** procedural background, including the letter that she had delivered to Judge Clark on July 27. (Ex. 51 (Add-27), ¶¶ 4-5)

Ms. Tatone promptly called the clerk for Referee Olson and the clerk for Judge Clark. (*Id.*, ¶¶ 6-8) Ms. Tatone faxed a letter to opposing counsel and to Judge Clark explaining that Ms. Patton had left the country with the understanding that the hearing would be postponed. (*Id.*, ¶ 11, Att. 2 (Add-30))

On the morning of the hearing, Ms. Tatone received a call from Peggy, Judge Clark's clerk, saying that she was working with the referee's clerk to change the date of the hearing. Peggy said that it probably would be rescheduled for the trial date, September 18. She said that she would confirm this with Ms. Tatone later in the morning. (*Id.*, if 13)

Ms. Tatone did not hear back from Peggy, so she left her office and started for the hearing. While en route, she was called by the referee's clerk. The clerk discouraged her from attending the hearing, stated that "the court knows Patton is unavailable," and said she thought the hearing might be rescheduled. (*Id.*, ¶ 14)

Ms. Tatone therefore returned to her office and did not attend the hearing. Referee Olson convened the hearing on an ex parte basis with Mr. Lillie. The referee stated that "[Ms. Tatone] wanted to come here today and everything and I told her not to come because ... she can't argue [the] summary judgment motion." (Tr. of 8/21/12, p. 17)

At the hearing, the referee focused on the original Scheduling Order. That order said nothing about discovery, but set a deadline of seven days prior to trial for both sides ***23** to submit their facts. (*See* Ex. 19) Mr. Lillie replied that the depositions had brought forth no facts germane to undue influence. The colloquy, in pertinent part, is as follows:

THE COURT: ... *[T]he original scheduling order says that she has until seven days prior to the trial date to submit her memorandum indicating facts* -- basically, what you're -- your argument under summary judgment motion [sic] is she hasn't provided any --

MR. LILLIE: She's provided -

THE COURT: -- no -- no facts --

MR. LILLIE: None.

THE COURT: -- that are germane to incapacity --

MR. LILLIE: lack of --

THE COURT: -- *undue influence?*

MR. LILLIE: Correct. Anything that would defeat the 2009 will.

THE COURT: Okay. But I'm--yeah. But now I'm looking at, you know, the original scheduling order. *Theoretically, seven days prior to the trial is when she's supposed to have that ready.*

MR. LILLIE: And *the reason we brought this motion is after depositions* the depositions -- and the Court has as part of the summary judgment packet, *nothing* --

THE COURT: Nothing (inaudible) forward.

MR. LILLIE: It talked about issues surrounding the -- the months before her death and issues where she lived and these different things. *Nothing about any of the issues germane to whether or not a will is* (inaudible).

(Tr. of 8/21/12, pp. 9-10 (emphasis added))

The referee then inquired about the financial and medical records that had not been produced at the request of Judith's counsel. (*Id.*, pp. 11-15) The referee inquired ***24** whether these records might establish issues of fact, and was assured by Mr. Lillie that they would not:

THE COURT: Could the financial records possibly show some type of -- I'm not saying that they do --

MR. LILLIE: No. Right.

THE COURT: --but -- *I'm trying to think if financial records could, in any way, show anything for her case, like undue influence or incapacity* -

MR. LILLIE: I -- I don't know how -- I --

THE COURT: *If she wasn't doing any of her financial records, if this other person was* --

MR. LILLIE: Um-hum.

THE COURT: -- because I think one of the tenants [sic] is that *they're kind of under this person's sway and that person's been paying other bills and that kind of thing, I think there might be a way that that would be part of her case* if she --

MR. LILLIE: There could be if it was alleged or specified in any way, shape, or form, but we've gotten none of that. I mean, the only -- *the objections are so general and benign* and they don't even rise to the standard that if any sort of fraud or *undue influ -- influence needs to be (inaudible) with specificity.* It's just the most generic three lines of basically citing the factors and nothing more.

And so I don't think it even rises to the legal standard -- that's part of the summary judgment motion. It doesn't rise to the legal standard to even allow them to have a hearing on the merits, and *all the depositions, none of it focused on any of that stuff.* It's the same thing.

THE COURT: Do you know what this motion for medical records she sent you is -- were you planning on --

MR. LILLIE: Well, when she contacted me on July 27th *I said, well. I don't know why you'd need them because I've given you the* ***25** *affidavit.* And that's when we had the whole discussion, and then she freaked out --

THE COURT: Well, I mean, *what if the records show something different than what the doctor's affidavits says* [sic]?

MR. LILLIE: I guess potentially they could, and *then the doctor lied under oath.*

(*Id.*, pp. 12-13, 14-15 (emphasis added))

The referee then directed Mr. Lillie to draft a summary judgment order. However, the referee stated:

I'm going to give her one last out to provide some type of basis -- evidence that anything we're going to do in the future is -- you know, has any use at all.... What I want you to add to the motion [sic] for summary judgment is respondent can request -- make a motion for reconsideration to be accompanied by evidence of her -- supporting her objection by X date.

(*Id.*, p. 16)

Mr. Lillie agreed to do this, made reference to “all this bologna” propounded by Ms. Patton, and said that he had a motion for sanctions pending on September 11. (*Id.*, pp. 17, 19) The referee directed that Judith's motion for reconsideration, if any, be argued on that date. (*Id.*, pp. 19-20) The hearing then concluded as follows:

THE COURT: Yeah. And kind of put the onus on her. Maybe she'll just say screw it, I give up --

MR. LILLIE: Yeah.... She's an interesting person [.]

(*Id.*, p. 22)

5. The Summary Judgment Order and Subsequent Filings

***26** On August 22, 2012, the court issued a one-page order granting John Sattle's motion for summary judgment. The order (signed by Referee Olson and by Judge Clark) gave no analysis supporting the summary judgment. It stated:

1. Summary Judgment is granted in favor of Petitioner, John D. Sattler.

2. The Court will allow Respondent the opportunity to file a Motion for Reconsideration to be heard in conjunction with Petitioner's Motion for Rule 11 Sanctions on September 11, 2012, at 9:00 a.m. before the Honorable Judge Clark. Respondent's motion must be filed no later than September 6, 2012, in compliance with Rule 6.04 of the Minnesota Rules of Civil Procedure, in order to give Petitioner sufficient time to file a response

.3. Judith Gaede's motion for reconsideration must be accompanied by evidence supporting her objection which was filed Dec. 10, 2010.

(Add-1)

Ms. Patton returned from Nepal and prepared a 17-page Memorandum of Law, with affidavits and exhibits. Her memorandum argued that summary judgment had been wrongly granted, marshalling law and evidence on undue influence and testamentary capacity. It also argued that crucial records had not been produced, and it argued against imposition of Rule 11 sanctions.

Ms. Patton fax-filed and served these documents, using an online faxing service. (Patton letter to Judge Clark, 9/10/12 (Add-24), p. 2) The faxing was slightly tardy, being completed just after midnight of the filing date. (*See* time entries of 00:56 and 01:43, EST, on the fax-filed documents) No prejudice was shown from this brief delay.

6. The Subsequent Hearing

***27** At the hearing on September 11, Mr. Lillie argued for Rule 11 sanctions. He argued that after the depositions there was "no evidence... no case law, no facts, nothing to support these claims," including the claim of undue influence. (Tr. of 9/11/12, pp. 10-11)

Ms. Patton asserted that "there are many crucial facts in dispute." (*Id.*, p. 18) The court replied that "we are here on a motion for sanctions; we are not arguing about summary judgment." (Id.) Ms. Patton responded: "[The motion for sanctions in part relies on Mr. Lillie's theory that there isn't any substance to this case and, in fact, there is." (*Id.*, p. 19)

The court then allowed Ms. Patton to argue facts supporting Judith's claim. She marshaled evidence of undue influence, including Harriet's vulnerability and the fact that "Susan Sattler was writing checks out of Harriet's checkbook." (Id., pp. 20, 25-26, 31) Ms. Patton concluded: "[J]ust the Sattlers' evidence alone creates enough genuine issues of material fact... There are all kinds of credibility determinations, and that is precisely the kind of case that the Minnesota Supreme Court has said needs to go to a trier of fact." (Id., p. 37)

A crucial exchange took place between Ms. Patton and Judge Clark with regard to her trip to Nepal and the ex parte hearing. Ms. Patton described her letter to the court requesting a continuance and the subsequent call which she received from the clerk. This colloquy ensued:

MS. PATTON: ... [O]n July 30th the court clerk told me the hearing was off and then --

***28** THE COURT: Oh, really.

MS. PATTON: Yeah, Peggy, *I have my contemporaneous notes of Peggy calling me and she says Judge Clark says both the summary judgment hearing and the trial need to be continued.* And --

THE COURT: Ms. Patton, first of all, the summary judgment motion was not scheduled before me. It was scheduled before Judge --Referee Joel Olson. Secondly, *my recollection is, I told my clerk --sitting right there - that as far as I was concerned*

that it could be rescheduled, but that you would have to contact the probate office to make the appropriate arrangements since the matter was not scheduled before me. I don't handle Referee Olson's calendar, he doesn't handle mine. And this note I got from my clerk indicated that the probate office - to your knowledge and to my knowledge and to the probate office's knowledge, you did not seek the continuance from their office. So --

MS. PATTON: Your Honor, I understand what you are saying about the distinction between the two offices. *What my understanding was my notes say that I was to contact Janee, so what I did was I wrote to Janee from -- I was in the Chicago airport and I wrote to her and said --asked for the hearing on my motion to get the records* because Mr. Lillie has refused to sign stipulations and we need medical, banking and estate planning records in order to make our case. So I called her and she told me this is going to be tough, but we will look at a date in September, and then I wrote in the cover letter those records are essential to making the case and filed my notice of motion and motion. And then Janee reminded me via e-mail to me in Nepal that I coul't do that by e-mail, so I wrote another notice of motion and sent it by fax from Nepal.

So *I understand what Your Honor is saying about the distinction between your calendar and Judge Olson's but that wasn't the way I understood it. And I believe that if the judge on the case says that these two things should be continued that they get continued. I didn't know Mr Olson was in the picture at the time. And the result is an ex parte hearing on August 21st while I am 10,000 miles away and have a motion --a discovery motion pending.*

And as we wrote in our brief, Your Honor, when the case law says that it is error to grant a motion for summary judgment while a motion -discovery motion is pending, the only reason -- and that is on -- that footnote --

***29** THE COURT: Well, then I can interrupt you right there. If it is error, then you should have appealed it. Has your notice of appeal been filed yet, Counsel?

(*Id.*, pp. 33-35 (emphasis added)

At the end of the hearing, the court called for both sides to submit proposed orders. (*Id.*, p. 40) Both sides did. The court adopted, verbatim, the 11-page proposed Order and Memorandum which was submitted to it by Respondent's counsel.

7. *The Orders and Judgments*

The Order and Memorandum was issued on September 24, 2012. (Add-2) It stated, inter alia, that (1) “Respondent has failed to produce any evidentiary support” for objecting to the contested will; (2) “Respondent did not request a continuance for the summary judgment hearing;” (3) “There were no discovery motions pending before the court when summary judgment was granted;” (4) “Respondent and Respondent's counsel failed to investigate the bases for the objection” to the will; and (5) “Respondent's objection is not supported by any existing law and thus, is brought in bad faith.” (Order, p. 2; Memorandum, pp. 2-4 (Add-3, 8, 10))

On October 11, 2011, the court issued an Order for Judgment. (Add-13) It made reference to the orders of August 22 and September 24. It declared the latter order to be “the final disposition of this matter,” and found “no reason to delay the entry of Judgment.” (Add-13 to 14) Judgment was entered that same day. (Add-14)

On October 12, 2012, Mr. Lillie wrote to the court enclosing an affidavit of attorney's fees and costs, proposed orders, and proposed letters testamentary. The court issued both proposed orders on October 24. (Add-15, Add-17) The Order Granting ***30** Attorney Fees awarded John Sattler $2.055.23 against Judith and $15,155.30 against Ms. Patton. (Add-15, 16)

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT GRANTING A CONTINUANCE FOR FURTHER DISCOVERY.

Standard of Review

The appellate court reviews a district court's denial of a motion for a continuance for an **abuse** of discretion. *City of Maple Grove v. Marketline Construction Capital, LLC,* 802 N.W.2d 809, 818 (Minn. App. 2011).

A. Procedural and Factual Context

Judith's counsel, Ms. Patton, repeatedly sought discovery of documents in the months before the summary judgment hearing. Specifically:

● At depositions in May, she asked the Sattlers to produce the Bremer Bank records, and said that depositions would have to be reconvened after those records were produced.

● In her July 2 e-mail to Mr. Lillie, she sought a stipulation for production of medical, financial and estate planning records, stating again that depositions must be reconvened after they were produced.

● In her July 27 letter requesting a continuance of the hearing from Judge Clark, she stated, *inter alia:*

On July 2, 2012, I sent a complete set of stipulations to opposing counsel John C. Lillie for us to obtain all of the medical, financial, and estate planning documents in this case. [citation omitted] ***31** Neither his client nor mine has a complete set of records, and *those records are essential for trial of the critical issues in this case regarding lack of capacity and undue influence* surrounding Harriet Meyers' April 2009 will.

As of today, Mr. Lillie still had not responded to my request that he sign the stipulation to get complete medical, financial, and estate planning records.

For these reasons, *I respectfully request that the court postpone Mr. Lillie's motion so that... it can be heard after resolution of the apparently-burgeoning dispute around complete records* (including those records needed to complete discovery depositions)... No pretrial scheduling order is in place, *critical discovery necessary for trial has yet to be completed*, and no party would be prejudiced by this request.

(Add-20, 22 (emphasis added)

● Pursuant to her understanding of the call from the judge's clerk, Ms. Patton contacted the probate court, scheduled a hearing on a motion to compel, and fax-filed the motion from Nepal.

All these actions were timely under the trial court's scheduling order. That order imposed no discovery deadlines, and simply called for the parties to present their facts a week before the trial.

At the ex parte hearing, the referee called attention to the scheduling order. He asked “if the financial records [could] possibly show some type of... undue influence,” where the testator is “kind of under this person's sway and that person's been paying the bills and that kind of thing.” (Tr. of 8/21/12, pp. 9, 10, 11-12) Mr. Lillie replied that “all the depositions, none of it focused on any of that stuff.” (*Id.*, pp. 12, 13)

***32** This was untrue. At her deposition, Susan Sattler had acknowledged numerous checks which Harriet had signed to Susan, to Sandra and to “cash” for unidentified purposes. (Ex. 10, pp. 53-66) Those checks (drawn on the American Bank account) often had been written by Susan and signed by Harriet with irregular signatures. (*Id.*, pp. 46-47, 48, 50, 51-52)

This was *exactly* the sort of evidence about which the referee had inquired. Moreover, the unproduced financial records at issue (from Bremer Bank) were likely to yield similar evidence. On that bank account (established by Kathleen with $15,000 of Harriet's money), Susan was an authorized signer. (*Id.*, pp. 6-7, 50)

The referee then asked Mr. Lillie about "this motion for medical records." (Tr. of 8/21/12, p. 14) Mr. Lillie said, "I don't know why you'd need them," citing the affidavit of Harriet's doctor attesting to her mental clarity. (*See id.*, p. 15) The referee persisted, "[W]hat if the records show something different than what the doctor's affidavits says [sic]?" (*Id.*) Mr. Lillie answered, "[T]hen the doctor lied under oath." (*Id.*)

In fact, Harriet's medical records could be consistent with the doctor's affidavit, yet show additional facts probative of undue influence. *Cf. In re Estate of Opsahl*, 448 N.W.2d 96, 99 (Minn. App. 1989) (testator's doctor found her competent but also stated that she "could be influenced rather easily"). Respondent's own exhibits indicate several possibilities of this sort:
● Harriet suffered chronic pain from her broken hip, screamed with pain, was treated with "all these pills," and at some point was treated with morphine. ***33** (Ex. 10, p. 72, Ex. 13, pp. 84-85) Her medication history at the time that she signed the second will is relevant for showing vulnerability to undue influence.

● The doctor stated that Harriet "spoke about not remembering all of what happened while she was in Arizona and that she was not clear in thinking while she was in Arizona." (Ex. 16, ¶ 5) Notations in the records on this point are clearly relevant to demonstrate that she could have been misled about what occurred in Arizona.

● *Opsahl* states that during a doctor's examination, "family members repeatedly told decedent that she had been taken advantage of and used, and decedent began repeating what her children said." 448 N.W.2d at 99. Notes on Harriet's interactions with family members clearly could support an inference of undue influence.

In sum, at the ex parte hearing, the referee identified good reasons for continuing the hearing to require production of records. Respondent's counsel dissuaded the referee from this course of action, for reasons which are rebutted by Respondent's own exhibits. As will be shown below, these facts support a reversal of summary judgment.

B. Legal Analysis

1. Granting Continuances for Discovery Pending Summary Judgment

The leading case on granting continuances for discovery is *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982). In Rice, the Court held that continuances "should be liberally granted" under Minn. R. Civ. P. 56.06. *Id.* at 412. It continued:
***34** Given this presumption in favor of granting continuances to allow sufficient time for discovery, we focus on two questions:

(1) Has plaintiff been diligent in obtaining or seeking discovery prior to its Rule 56.06 motion? And

(2) Is plaintiff seeking further discovery in the good faith belief that material facts will be uncovered, or is she merely engaging in a "fishing expedition?"

Id. at 413. This test has been applied in subsequent case law.

In *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985), as in the present case, litigation had been in process for two years. As in the present case, the plaintiffs unexpectedly were faced with summary judgment motions amid a "procedural morass." *Id.* at 211, 216-17. The district court granted summary judgment, but the Supreme Court reversed, observing:

There is no question that, in the present case, *the Bixlers are likely to discover material facts by further discovery*.... Under these circumstances, the appellants survive the "fishing expedition" inquiry.

The diligence issue presents a closer question. The trial court was of the opinion that the Bixlers had had adequate time to discover relevant facts since the commencement of the original lawsuit, and was [sic] not entitled to more time. *Viewed in light of the procedural history of these lawsuits, however, the Bixlers' failure to conduct this discovery does not appear unreasonably dilatory.*

Id. at 217 (emphasis added).

Following Rice and Bixler, this Court repeatedly has reversed summary judgments on grounds that the trial court should have granted a continuance for additional discovery. *See, e.g.*, *U.S. Bank Nat. Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 433-34 (Minn. App. 2000) (citing, inter alia, "relative availability of evidence to the parties"); *One Beacon* ***35** *Ins. Co. v. Datalink Corp.*, 2009 WL 1311787 *2 (Minn. App. May 12, 2009) (App-41) ("there is ample reason for the district court to permit further discovery... before the case is decided by the blunt instrument of summary judgment") ;*Pfuhl v. St. Luke 's Hospital Ass' n of Duluth*, 1998 WL 404840, *2 (Minn. App. July 21, 1998) (App-15) ("it was premature and unfair for the district court to decide there was no question of fact without first deciding the motion to compel").

Here, as in the foregoing cases, Appellant is "likely to discover material facts" if the discovery is allowed. *See Bixler*, 376 N.W.2d at 217. The Bremer Bank records are likely to show opportunity for undue influence, actual exercise of such influence, and a confidential relationship, as the American Bank records already do.

As in *Bixler*, moreover, Judith's counsel, Ms. Patton, was diligent in seeking discovery. She took the case in February, conducted multiple depositions (at which she requested documents) in May, proposed a stipulation for production of documents on July 2, asked the court to intervene on July 27, and filed a motion to compel (by fax from Nepal) on August 8. All this was in the context of a scheduling order permitting facts to be gathered until a week before the trial date (September 18).

This Court should follow Bixler and hold that the trial court erred by granting summary judgment without first allowing a continuance for further discovery. The presumption in favor of granting a continuance clearly is operative here. The trial court **abused** its discretion by granting summary judgment without ruling on Judith's request for a continuance or her motion to compel.

2. Lack of a Formal Motion or Affidavit Under Rule 56.06

***36** Judith Gaede's request for a continuance was made by her counsel's letter to the court on July 27, 2012, rather than by a formal motion under Rule 56.06. *Bixler*, however, expressly held that a formal motion is not required:

> While the counsel's affidavit does not constitute a formal motion for a continuance, under Rule 56.06, Minn. R. Civ. P., *a trial court may grant a continuance to permit further discovery even absent such a formal motion.*

376 N.W.2d at 216 (emphasis added).

In the present case (unlike *Bixler*), Ms. Patton's request for a continuance was not accompanied by an affidavit. This Court has held that "failure to submit such an affidavit, by itself, justifies the district court's decision to rule on the [summary judgment] motion without granting relief under rule 56.06." *Molde v. Citimortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010). This Court, however, should distinguish *Molde* and hold that relief should have been granted under the facts of the present case.

Bixler supports such a distinction. Its holding that "[c]ontinuances should be liberally granted" cites to *Rice* and to an authoritative civil procedure treatise. *See Bixler,* 376 N.W.2d at 216. The treatise observes that

> courts have stated that *technical rulings have no place* under [former Federal Rule 56(f), now Federal Rule 56(d), the counterpart of Minnesota Rule 56.06] and that it should be applied with a spirit of liberality. Thus, in certain circumstances courts have indicated that *continuances would be proper even though Rule 56(f) had not been formally complied with* when the court concluded that the party opposing summary judgment had been diligent and had acted in good faith.

10B C. Wright, A. Miller and M. Kane, Federal Practice and Procedure (1998), § 2740, pp. 402-403 and n. 14 (emphasis added) (citing case law reversing summary judgment "even though plaintiff failed to file the required affidavit").

***37** Many cases have ordered continuances for discovery, despite a lack of affidavits under Rule 56. *See, e.g., Thompson v. Fathom Creative, Inc.,* 626 F. Supp. 2d 48, 53 n. 2 (D.D.C. 2009) ("other documents ... may suffice 'to alert the district court of the need for further discovery' and therefore serve as the 'functional equivalent of an affidavit"'); *Harrods Ltd. v. Sixty Internet Domain Names,* 302 F.3d 214, 245 (4th Cir. 2002) ("if the nonmoving party was not lax in pursuing discovery, then we may consider whether the district court granted summary judgment prematurely, even though the nonmovant did not record its concerns in the form of a Rule 56(f) affidavit").

These authorities militate for granting a continuance despite the lack of an affidavit here. Ms. Patton's letter was "the functional equivalent of an affidavit," and she had not been lax in pursuing discovery. She was compelled to act on short notice, after being surprised by the motion just before leaving for Nepal.

In Molde, this Court cited numerous flaws not found in the present case other than lack of an affidavit. The Molde plaintiff had (1) belatedly raised a discovery issue to oppose summary judgment; (2) merely stated in conclusory fashion that he was "entitled to discovery;" and (3) made no statements concerning "the reasons for the failure to complete discovery to date." 781 N.W.2d at 45.

In the present case, by contrast, Ms. Patton's letter of July 27 cites her unsuccessful efforts to obtain medical, financial, and estate planning records. She states that the records are essential to prove undue influence, and she names a specific witness whose deposition cannot be completed without them.

***38** This Court, accordingly, should distinguish *Molde* and should apply the policy of liberally granting continuances, as set out in *Bixler*. The Court should hold that the district court **abused** its discretion in not granting a discovery continuance here.

3. Other Factors Which Militate for Reversal

Several other factors militate for a reversal on the continuance issue. One is the affirmative action taken by Judge Clark's clerk in telephoning Ms. Patton in response to her letter of July 27. Ms. Patton reasonably understood the clerk to say that Judge Clark had ordered a continuance, and left the country in reliance on that understanding. (*See* Tr. of 9/11/12, pp. 33-35)

A second factor is Ms. Patton's attempt to arrange for substitute counsel when she learned that the hearing had not been postponed. Had Ms. Tatone been allowed to attend, she could have refuted the arguments against a continuance. It was unreasonable to bar Ms. Tatone from making an appearance, under the circumstances here.

A third crucial factor is Mr. Lillie's response to Referee Olson at the ex parte hearing. The referee, sua sponte, raised the pivotal question whether the unproduced financial records "[could] possibly show some type of... undue influence." The referee raised

the possibility that the testator was "kind of under this person's sway and that person's been paying other bills and that kind of thing." Mr. Lillie responded that "all the depositions, none of it focused on any of that stuff." (Tr. of 8/21/12, pp. 14-15)

In fact, Susan Sattler's deposition was replete with exactly the sort of evidence about which the referee had inquired. (Ex. 10, pp. 6-7, 39-68) A candid answer would have acknowledged Susan's writing of checks for Harriet and Susan's authority to sign ***39** checks on the Bremer Bank account (the records of which had been specifically requested but not produced). Had such a candid answer been given, the referee almost certainly would have ordered a continuance for further discovery.

The misleading answer to the referee is an additional ground for reversing the summary judgment. *Cf. Halloran v. Blue and White Liberty Cab Co.*, 253 Minn. 436, 92 N.W.2d 794, 798 (1958) (distinguishing "mere failure to disclose ... matters which would defeat a party's claim" from cases where "a court is misled" by affirmative conduct). For all the foregoing reasons, this Court should order the summary judgment vacated and further discovery allowed.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING APPELLANT'S CLAIM OF UNDUE INFLUENCE.

Standard of Review

On an appeal from summary judgment, this court reviews the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). The court should view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A. Overview

Even if this Court concludes that the probate court did not err in its procedural rulings, it should reverse the summary judgment. Even if Judith properly was denied a continuance, barred from having Ms. Tatone argue, and barred from having her filings considered, the merits of the judgment should be reviewed. *See, e.g., JPMorgan Chase* ***40** *Bank, N.A. v. Erlandson*, 821 N.W.2d 600, 602-604 (Minn. App. 2012) (reviewing the merits of an award of summary judgment, although "appellants did not respond to the bank's motion for summary judgment and did not appear at the hearing on that motion").

The district court in the present case granted summary judgment in one sentence, with no analysis. (Add-1) Genuine issues of fact, however, were established by Respondent's own exhibits. Respondent, moreover, cited no case law granting summary judgment on the pivotal issue of undue influence.

Case law on undue influence stresses the importance of credibility assessments and of circumstantial evidence. Those factors render summary judgment inappropriate in most cases. It clearly was inappropriate here.

B. Fact Issues Established by Respondent's Own Exhibits.

To establish undue influence, a contestant must show that another person exercised undue influence at the time the testator executed the will to the degree that the will reflects the other person's intent rather than the testator's intent. *In re Estate of Torgerson;* 711 N.W.2d 545, 550 (Minn. App. 2006). Generally, direct evidence of undue influence is not available and circumstantial evidence can be sufficient. *Opsahl*, 448 N.W.2d at 100.

Six well-settled factors are to be applied in determining whether undue influence occurred. They are as follows:

> (1) an opportunity to exercise influence; (2) the existence of a confidential relationship between the testator and the person claimed to have influenced the testator; (3) active participation by the alleged influencer in

> preparing the will; (4) an unexpected disinheritance or an unreasonable disposition; ***41** (5) the singularity of the will provisions; and (6) inducement of the testator to make the will.

Torgerson, 711 N.W.2d at 551.

In the present case, genuine issues as to all six factors are shown *by Respondent's own exhibits.* As will be shown below, similar evidence has been held sufficient in on-point Minnesota cases. The principal evidence is as follows:

1. Opportunity to Exercise Influence.

When Harriet executed the second will, she was 92 years old. She recently had suffered a stroke which required three months of rehabilitation. (Ex. 13, pp. 55, 78-80) She also had broken a hip, had surgery and suffered chronic pain for which she was treated with morphine. (Ex. 10, p. 72, Ex. 13, pp. 84-85)

Following the stroke, Harriet was "always lost... totally lost," "wimpy and pathetic," and crying constantly. (Ex. 13, p. 81) Her doctor states that she could not remember all of what had happened in Arizona. (Ex. 16, ¶ 5) After breaking her hip, she was weak, forgetful, and confused about the past. (*Id.*, pp. 95-96, 101-103)

When Harriet made the second will, she was living in Susan's living room, continually accessible to the Sattlers. (Ex. 10, pp. 38-40) The many large checks to Susan, to Sandra, and to "cash" which were written by Susan and signed by Harriet are crucial circumstantial evidence of opportunity for undue influence. (*See id.*, pp. 48-66)

2. Active Participation in the Preparation of the Will

John Sattler arranged for the preparation of the will by Dudley & Smith. (Ex. 10, p. 36) Judith, Susan and Sandra transported Harriet to the attorney's offices and spoke ***42** with him about Harriet "and the cabin and her children and grandchildren, whatever." (Ex. 9, p. 26; Ex. 10, pp. 29-30, Ex. 11, pp. 35-37) The Sattlers then brought her back to the office to sign the will. (Ex. 11, pp. 37-39)

This is ample evidence of "active participation." *See, e.g.*, *In re Estate of Reichenberger*, 2007 WL 1053299 (Minn. App. April 10, 2007), ** 4-5 (App-18) ("[the will proponent] was actively involved in every step of the process of selecting the attorney and arranging the meeting with testator, driving testator to the attorney's office and waiting for him while the will was drafted and executed").

3. *Confidential Relationship*

Susan Sattler wrote checks for Harriet to sign. (Ex. 10, pp. 46-47, 48, 58) Harriet's signatures on the checks were often irregular. (*Id.*, pp 51-52) Many of the checks were written to "cash," to Susan or to Sandra for purposes which cannot be established. (*Id.*, pp. 56-66)

Kathleen Sattler Andrede brought Harriet the paperwork to open a new account at Bremer Bank. (*Id.*, pp. 6-7) Harriet deposited $15,000 into this account and gave Susan authority to sign the Bremer Bank checks. (*Id.*)

These matters clearly establish a fact issue as to confidential relationship. This is especially so in view of Harriet's dependency and weakness. [3]

***43 4. Disinheritance of Those Who Probably Would Have Been Remembered**

This factor obviously is established by Hariet's disinheritance of Judith, her only surviving child.

5. Singularity of the Will Provisions.

The singularity factor "focuses on the nature and extent of the changes in the will from the testator's previous will." *Reichenberger,* *5. Here, the most significant changes were those favoring the Sattlers, the ones accused of undue influence. This establishes singularity. *See id.*

6. Exercise of Influence or Persuasion to Induce the Testator to Act

Actual exercise of undue influence can be inferred from circumstantial evidence. *See Opsahl,* 448 N.W.2d at 102. Such an inference can be based on the testator's weakness and confusion. *See id.* (Ex. 13, pp. 81, 95-96, 101-105) Also powerfully supporting the inference, in the present case, are the many checks written out by Susan and signed by Harriet, for unidentified purposes. (Ex. 10, pp. 47-66)

C. On-Point Minnesota Case Law

Numerous cases have found fact issues as to undue influence based upon evidence like the evidence of record here. Our courts repeatedly have stressed circumstantial evidence and the importance of credibility determinations by the finder of fact.

***44** The leading case of *In re Estate of Olson,* 227 Minn. 289, 35 N.W.2d 439 (1948) (much cited in subsequent case law) is closely analogous to this case. As here, an **elderly** testator, living with the proponent of the will, had a serious fall and injury shortly prior to its execution. *Id.,* 35 N.W.2d at 442. As here, the attorney who drafted the will (as well as a witness who worked in his office) swore that the testator was of sound mind. *Id.* at 443-44.

The *Olson* court nevertheless held that circumstantial evidence supported an inference of undue influence. It stated, in part:
[W]here a person enfeebled by old age or illness makes a will in favor of another person upon whom he is dependent, and that will is at variance with a former will made, or intentions formed when his facilities were in their full vigor, and is opposed to the dictates of nature and justice, *the presumption is that such a will is the result of undue influence,* unless that presumption is satisfactorily rebutted by other evidence in the case.

The facts that a lawyer drew the will and that the witnesses to the will observed no undue influence are to be considered as part of the entire fact situation in determining whether there was undue influence, but alone they *do not establish the absence thereof.*

Id. at 445-46 (emphasis added).

The *Olson* analysis was subsequently applied by this Court in *Opsahl.* There, as in the present case, an **elderly** woman in poor health lived with her daughter. She favored the daughter in her will for reasons like those which Harriet gave for favoring some of her grandchildren in her own first will ("decedent wanted ... to provide a home for Marjorie because decedent's other children had homes of their own, but Marjorie did not"). *Opsahl,* 448 N.W.2d at 98.

***45** As in the present case, the **elderly** woman in *Opsahl* went to visit other relatives. While on that visit, she revoked her will and signed a new will favorable to them. As in the present case, both the attorney who drafted the will and the patient's doctor testified that she was competent. *Id.* at 99-100.

Despite this evidence, the Opsahl court found fact issues with regard to undue influence. It stressed the importance of circumstantial evidence ("the proponents had unlimited access to decedent"). *Id.* at 100. And it stressed the importance of credibility determinations ("The trial court was entitled to disregard [the attorney's] testimony based on its assessment of his credibility"). *Id.* at 101-102.

Minnesota courts repeatedly have cited the foregoing cases to find issues of fact with regard to undue influence. *See, e.g.*, *ORourke v. O'Rourke*, 283 Minn. 293, 167 N.W.2d 733, 735 (1969) (reversing JNOV, citing Olson); *Nelson v. Holland*, 776 N.W.2d 446, 451-52 (Minn. App. 2009) (reversing summary judgment, citing Opsahl); Reichenberger, ** 4-5 (finding issues of fact, citing Olson).

This Court should follow the foregoing cases. Respondent's own evidence establishes genuine issues of material fact with regard to undue influence. Based on that evidence alone, the summary judgment should be reversed.

III. THE DISTRICT COURT ERRED IN NOT VACATING THE SUMMARY JUDGMENT ON GROUNDS OF EXCUSABLE NEGLECT.

Standard of Review

Appellate courts review decisions on motions to vacate judgments for **abuse** of discretion. *Kern v. Janson*, 800 N.W.2d 126, 132 (Minn. 2011). Where the district court ***46** fails to apply the four-part "*Finden* test" which governs such motions, the appellate court may apply it de novo. *Reid v. Strodtman*, 631 N.W.2d 414,419 (Minn. App. 2001).

Argument

The probate court's summary judgment order gave Judith Gaede permission to move for reconsideration, with supporting evidence, by September 6. Judith's counsel, Ms. Patton, fax-filed a 17-page memorandum marshalling law and evidence to show that summary judgment was improper. She also filed some 39 pages of affidavits and exhibits.

Ms. Patton relied upon an online faxing service, myfax.com. (Patton letter to Judge Clark, 9/10/12, p. 2) The filing would have been timely had it been completed by midnight on the 6th. The probate court's records, however, show that the memorandum arrived at 0:56 AM on the 7th and that the exhibits arrived at 1:43 AM.

Later on the 7th, John Sattler's counsel, Mr. Lillie, sent a letter to Judge Clark. Mr. Lillie asserted that the filing and the service were untimely. He argued that "this matter has come to an end," and urged the court to restrict its further proceedings to Rule 11 sanctions.

Ms Patton responded to this letter with a letter to Judge Clark on September 10. (Add-24) She argued, in part:

> In keeping with the analogous standards for setting aside a "default" judgment under Rule 60.02, my client should be permitted to proceed: (1) *she is possessed of a reasonable defense on the merits* as shown in her exhaustive memorandum and exhibits filed [in] opposition to summary judgment; (2) *she has a "reasonable excuse" for her counsel's failure to appear* because I received only five days' notice of the hearing and was 10,000 miles away; (3) *she has acted with due diligence* after notice of the ***47** outcome of the August 21st ex parte hearing as shown by her exhaustive brief and exhibits; and (4) *the other side has made absolutely no showing of prejudice* if the motion were to be properly heard on its merits.

(*Id.*,p. 2 (emphasis added)) She also argued that the slight tardiness in completing the fax-filing should not lead to a dismissal. (*Id*)

The four factors cited in Ms. Patton's letter (the "*Finden* factors") are used to determine whether a court should grant relief for excusable neglect. *See Reid,* 631 N.W.2d at 419; *Finden v. Klas,* 268 Minn. 268, 128 N.W.2d 748, 750 (1964). All four must be proven, but a weak showing on one factor may be offset by a strong showing on the others. *Reid, id.*

The Finden factors are grounded in the jurisprudence of M. R. Civ. P. 60.02, but they also are applied in analogous contexts. *See e.g., Betts v. M. I. L. Realty Corp.,* 269 N.W.2d 42, 45 (1978) (factors applied in workers' compensation proceedings, by analogy to Rule 60.02); Reid, 631 N.W.2d at 418-19 (factors applied in child support proceedings); *Sitek v. Sitek,* 2010 WL 2900344 *4 (Minn. App. July 27, 2010) (App-24) (factors applied in maintenance proceedings, where Rule 60.02 neither governed nor had been cited).

Case law applying the *Finden* factors clearly supports relief from the summary judgment here. Our Supreme Court repeatedly has stressed "a liberal policy conducive to the trial of causes on their merits," *Betts,* 269 N.W.2d at 45, and "a strong policy favoring the granting of relief when judgment is entered through no fault of the client." *Nguyen v. State Farm Mutual Automobile Ins. Co.,* 558 N.W.2d 487, 491 (Minn. 1997).

***48** Applying these policies, courts repeatedly have granted relief from judgments entered through oversights and tardiness by attorneys. *See, e.g., Betts,* 269 N.W.2d at 45 (attorney missed a deadline because the file was "inadvertently and mistakenly mixed in with other matters that did not require immediate action"); *Charson v. Temple Israel,* 419 N.W.2d 488 (Minn. 1988) (attorney missed a deadline because he was unaware that case had been filed); *Nguyen,* 558 N.W.2d at 488, 491 (attorney missed a deadline due to unexplained "clerical error"); *Bielke v. Fairview-University Medical Center,* 2003 WL 22234892 *5 (Minn. App. Dec. 23, 2003) (App-29) (attorney missed a deadline for filing affidavits, and "concedes that he was neglectful in not moving for a time extension").

Very recently, in *County of Rice v. Cervenka,* 2012 WL 4329056 (Minn. App. Sept. 24, 2012) (App-35), the district court dismissed a case because attorneys (1) failed to file an informational statement; (2) failed to respond to a provisional dismissal order; (3) failed to file a statement of the case; (4) failed to respond to a statutory disclosure deadline; (5) failed to respond to discovery requests; and (6) failed to appear at a pretrial hearing. *Id.* at **1-2. This Court applied the Finden factors, found "a strong case on the merits," and ordered the case reopened under Rule 60.02, stating:
[U]sing errors attributable to counsel to deny the landowners' motion to reopen is both inconsistent with the general principle that *courts try to avoid penalizing a party for mistakes not attributable to the party and inconsistent with "the spirit of Rule 60.02,"* which invokes a "liberal policy conducive to the trial of causes on their merits[.]" [citations omitted]

While the district court's frustration with the delays associated with the case is not unwarranted, we conclude that on these unique facts, *it was an* ***abuse*** *of discretion to decline to reopen the case.*

***49** *Id.,* *5 (emphasis added)

A similar holding is warranted here. Judith Gaede has "a strong case on the merits." Respondent's own exhibits show that summary judgment should not have been granted.

This Court, accordingly, should order the judgment vacated. The Finden factors clearly warrant relief from judgment on the record here.

IV. THE DISTRICT COURT ERRED IN GRANTING RULE 11 SANCTIONS.

Standard of Review

The appellate court reviews the district court's award of sanctions under M. R. Civ. P. 11 for an **abuse** of discretion. *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 145 (Minn. App. 2011).

Argument

Even if this Court rejected all the arguments above, it should reverse the award of Rule 11 sanctions. The district court awarded Respondent all of his attorney's fees incurred from the very outset of this case. Ms. Patton had been involved for only a few months, but was assessed personally for almost all these fees.

The district court held that Ms. Patton and Judith had acted in bad faith by "objecting to a will... where there is clearly no factual or evidentiary support." (Memorandum, p. 5 (Add-11) It also found that "Respondent did not request a continuance for the summary judgment hearing" and that "[t]here was no discovery ***50** motion pending before the court when summary judgment was granted." (Id.,p. 2 (Add-8); Order, p. 2 (Add-3))

The district court's Findings, Conclusions, Order and Memorandum, 11 pages in all, were adopted verbatim (including typographical errors) from Respondent's draft. This Court has vigorously cautioned against the verbatim adoption of findings. *See, e.g., County of Dakota v. Blackwell*, 809 N.W.2d 226, 230-31 (Minn. App. 2011) (appellate court cannot "determine the extent to which the court's decision was independently made"). That caution applies *a fortiori* where a district court adopts not only findings but a whole memorandum as well.

The district court' findings were clearly in error. As has been shown above, (1) abundant evidence supports Judith's objection to the will; (2) Judith did request continuance of the summary judgment hearing; and (3) there was a discovery motion pending when the summary judgment was granted.

It is well settled that "a colorable or good-faith claim does not warrant sanctions." *Peterson v. 2004 Ford Crown Victoria*, 792 N.W.2d 454, 461-62 (Minn. App. 2010). "The basis for a complaint must be *entirely unfounded* and frivolous before an award of fees is proper." *Block v. Target Stores*, 458 N.W.2d 705, 713 (Minn. App. 1990) (emphasis by the court).

A case directly on point for this matter is *In re Estate of Smith*, 444 N.W.2d 566 (Minn. App. 1989). There as here, the district court found bad faith and awarded attorney's fees against a disinherited child who contested a will. This Court reversed, stating:

> ***51** Our review of the record reveals evidence showing that *appellant had at least a colorable claim (good faith) of undue influence.* As the trial court itself pointed out, *a confidential relationship did exist* between the decedent and Hazel Smith, and Hazel had the opportunity to exercise undue influence over the decedent. Additionally, *evidence in the record suggests that Hazel dominated her husband* in the past and, as primary beneficiary of his will, may have tried to exert some influence here. Further, *appellant, as an excluded child of a decedent*, is certainly within the pool of entities from which a claim of undue influence might arise.

Id. at 568 (emphasis added).

Smith's reasoning directly governs this case. As has been shown above, (1) "a confidential relationship did exist" between Harriet and Susan Sattler; (2) "evidence in the record suggests that [Susan] dominated [Harriet]" with regard to her bank accounts; and (3) Judith, "as an excluded child of a decedent," was entitled to bring a claim.

This Court, accordingly, should reverse the district court's findings of bad faith. It should hold that the district court **abused** its discretion under Rule 11, and should vacate that award.

CONCLUSION

Respondent's own exhibits show genuine issues of fact with regard to undue influence. The records which Appellant sought (including the Bremer Bank records and the medical records) were likely to support those genuine issues. The referee focused on the records at the ex parte hearing, and wrongly was dissuaded from granting a continuance.

Clearly, a continuance should have been granted. All the subsequent judicial errors flowed from the failure to grant it. Summary judgment was wrongly entered, Rule ***52** 60 relief was wrongly denied, bad faith was erroneously found, and Rule 11 sanctions were unfairly granted.

This Court should reverse all the foregoing actions. It should remand the case with instructions that the records be produced and that the matter proceed to trial.

Footnotes

1 The court's orders all would have been independently appealable in any event pursuant to Minn. Stat. § 525.71(a).

2 Exhibits 1 to 39 are attached to the Affidavit of John Lillie filed in support of John Sattler's Motion for Summary Judgment. Judith Gaede's opposition to John Sattler's motions relied on those exhibits and added Exhibits 40 to 51. The latter exhibits are attached to the Affidavit of Teresa Patton, filed September 7, 2012.

3 No Minnesota case seems to have defined “confidential relationship” in the context of undue influence on a testator. Cases in other states stress the weakness and dependency of the testator as defining characteristics. *See, e.g., In re Estate of Stockdale,* 196 N.J. 275, 304, 953 A.2d 454, 470 (2008) (“In general, there is a confidential relationship if the testator, ‘by reason of... weakness or dependence,’ reposes trust in the particular beneficiary”).

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